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BEFORE THE
UNITED STATES
FEDERAL COMMUNICATIONS COMMISSION

RECEIVED

MAR 4 1985

FCC
Office of the Secretary

In re Complaint of)
)
Central Intelligence Agency,)
Complainant,)
)
vs.) FCC Docket No. _____
)
American Broadcasting Company,)
Respondent.)

SUPPLEMENTAL FILING OF CIA
AND
OPPOSITION OF CIA TO AMERICAN CIVIL LIBERTIES UNION
PETITION FOR DECLARATORY RULING

The United States Central Intelligence Agency ("CIA") hereby submits this Supplementary Filing in further support (1) of our position that a government agency is a proper party to bring complaints in general and under the Fairness Doctrine and associated rules, and (2) of our request for an oral hearing.

In addition, we address our position that neither the American Civil Liberties Union ("ACLU") nor the Media Access Project ("MAP") has standing to intervene or otherwise participate in this proceeding, and formally oppose the ACLU Petition For Declaratory Ruling.

I. Preliminary Statement

As the Commission is aware, the CIA on 21 November 1984 filed a complaint charging that the American Broadcasting Companies, Inc. ("ABC") engaged in deliberate news distortion and violated the Fairness Doctrine and the corollary Personal Attack Rules during broadcasts on 10, 20 and 26 September 1984. Several weeks later on 11 December, the Media Access Project, citing no procedural basis, filed a "statement in opposition" to the CIA and apparently attempted to intervene in our fairness complaint as a party on behalf of ABC. Despite what we believed to be an utter lack of precedent, this "statement" by MAP was accepted for filing and was considered by staff.

Subsequent to the staff's ruling of 10 January 1985 and CIA's submission of an Amended Complaint and Petition for Reconsideration, the ACLU filed a Petition for Declaratory Ruling dated 22 January 1985 1/ which sought formally to overturn the well-established rule that any person or organization has standing to file a fairness complaint. 2/

1/ This petition was submitted pursuant to 47 CFR \$1.2 which provides that "[t]he Commission may, in accordance with \$5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."

2/ This rule was followed in the 10 January 1985 Staff Ruling in the instant complaint. See Complaint of CIA Against ABC, Inc., staff ruling at 1, n.1 (10 January 1985).

There followed in short order and on the same day MAP's further "statement in opposition" to our complaint 3/ and the ACLU's request 4/ to the Commission to consider their earlier filing as not only a Petition for Declaratory Ruling but also a "statement in opposition" to the CIA's complaint. 5/

Although we submit that the standing of the CIA to bring this fairness complaint is clear, the position of the ACLU 6/ compels us to review for the Commission the well-established precedent.

3/ See Statement Of Media Access Project In Opposition To Amended Complaint And Petition For Reconsideration By The Central Intelligence Agency, filed 19 February 1985.

4/ See Letter from Communications Law Clinic to Mark S. Fowler, Chairman, FCC, dated 19 February 1985. In this letter, the ACLU requested "that its Petition for Declaratory Ruling be incorporated by reference in the proceeding concerning the CIA's February 8, 1985 filing as a statement in opposition to that filing." On 20 February, again by letter, the ACLU attempted to correct certain procedural errors and, for the first time, served the CIA. Until the receipt of this letter some days later, the CIA had received no papers from the ACLU.

5/ To the extent that the Commission should accept the unitary ACLU dated 22 January, as first served on CIA by letter dated 20 February, as not only an attempt to intervene in the instant complaint but also as a separate Petition for Declaratory Ruling, the CIA hereby presents its opposition for the reasons more particularly set forth herein. Moreover, we note that such substantial changes in the Commission's established Fairness and news distortion rules must properly be considered only in the context of a formal rule-making process to be conducted in full conformity with the applicable regulations -- 47 C.F.R. §1.401.

6/ In particular, we refer to the ACLU's statement that "[t]he CIA's filing of a fairness complaint is unprecedented. No government agency -- state or federal -- has apparently ever previously filed such a complaint with the Commission." See In the Matter of The American Civil Liberties Union Petition for Declaratory Ruling, dated 22 January 1985, at 5.

In doing so, we reiterate in Section II.B, infra, the identical nature of the rationale for the adoption of the relevant Commission⁴ rules and for the filing of our complaint: (1) that the public interest is paramount in this matter, and (2) that the public interest is ill-served by deliberate news distortion and violations of the fairness rules by a Commission licensee. When the violation of the Commission rules and the refusal of ABC to discharge its responsibilities became evident to us, then we, as might any citizen or group, advised the FCC, the responsible administrative body. The CIA seeks only the relief which the Commission believes appropriate. We seek no forfeiture to our benefit. We seek only that the rights of the American public to be fairly informed by mass media broadcasters are neither trampled nor disregarded by negligence or deliberate conduct by a Commission licensee.

II. The CIA Is A Proper Complainant

In light of the assertions by the ACLU and the MAP that it is unprecedented and inappropriate for a government agency to bring a fairness doctrine or news distortion complaint, we believe that a brief review of relevant precedent will unquestionably establish that the initial staff ruling on this issue was correct.

A. The Precedent

Commission precedent clearly demonstrates that, quite in keeping with the intent of the Communications Act and applicable rules, the Commission has often considered a complaint from a government agency or political subdivision -- often filed in its own name -- that a licensee distorted the news or violated the fairness doctrine. For example, in Complaint of Joe Faulk and The Bryan City Commission, 27 FCC 2d 346, reconsideration denied, 28 FCC 2d 639 (1971), the City Commission of Bryan, Texas, filed a complaint under the Personal Attack Rule when a local radio station accused the City Commission of financial improprieties with city tax revenues. There, the licensee did not deny that the City Commission had been personally attacked during a discussion of a controversial issue of public importance, but rather, in a remarkable parallel to this case and the position of the ACLU

and MAP, the licensee asserted, in part, a defense based on the First Amendment: i.e., that it "envisioned a 'robust debate' on the Bryan City budget as the result of the broadcast." 27 FCC 2d at 347. The Broadcast Bureau rejected the argument and found that the broadcast licensee had violated the personal attack rule by failing to comply with procedural requirements of the Rule. 7/

Of the greatest significance, however, is the fact that the Broadcast Bureau did not merely accept and act upon the complaint from the Bryan City Commission but specifically noted its acceptance of the idea that an attack on the Bryan City Commission -- a governmental body -- was an attack on an "identified group" for purposes of the personal attack rule. 28 FCC 2d at 639. 8/

The Commission has also considered numerous other cases, as in Complaint of Bryan City Commission, from a government agency or political subdivision which were filed in the name of the complaining body. See, e.g., In Re Complaints by Otero County Community Action Agency, 23 FCC 2d 55 (1970) (agency complained

7/ Notably, the Broadcast Bureau provided exactly the kind of relief suggested in the CIA's first complaint -- it placed the letter finding a violation of the Personal Attack Rule in the licensee's file where it would be "available for review and consideration" as an element of the licensee's overall performance. 27 FCC 2d at 347.

8/ The Commission has also explicitly recognized that a government (public) corporation is a person or organization for purposes of the Personal Attack Rules. In Re Complaint of New York City Health And Hospital Corporation, 32 FCC 2d 299 (1971).

of broadcasts which falsely created "hostile attitude toward the agency, its programs, and activities"); In Re Complaint by Lexington-Richland Economic Opportunity Agency, 24 FCC 2d 505 (1970) (agency complained of broadcast which, inter alia, constituted harassment to members of the public); In Re Complaint of New York City Health And Hospital Corporation, 32 FCC 2d 299 (1971) (government corporation complained of broadcast which contained "serious deficiencies and distortions and inaccuracies"); In Re Complaint of New York City Transit Authority, 45 FCC 2d 844 (1974) (semi-autonomous city authority with full police powers complained of report where sources alleged "vast, massive corruption").

Similarly, the Commission has heard fairness doctrine and personal attack complaints filed by and in the name of the governing bodies of cities and counties. See, e.g., Complaints by Board of Commissioners of Pine County, Minnesota, et al., 41 FCC 2d 201 (1973) (county board of commissioners complained when licensee broadcast charges that the board had misappropriated public assets and had sold public land in an illegal manner); Complaint by Mayor and City Council, Walsenberg, Colorado, 39 FCC 2d 1015 (1973) (city council and mayor complained when licensee broadcast charges of criminal conduct against the council.).

In yet additional cases, the Commission has entertained complaints from the executive heads of various government agencies and political subdivisions about broadcasts relating to those entities. See, e.g., Complaint by George B. Tielsch,

44 FCC 2d 776 (1974) (Chief of Police of Seattle, Washington, complained under the news distortion rule of "effort [in CBS news documentary] to discredit the Seattle Police Department and destroy public confidence in our professional confidence and integrity"); Complaint by Arthur K. Snyder, Councilman, City of Los Angeles, 39 FCC 2d 446 (1973) (city councilman complained of editorial which alleged that city council put "private profit over public safety"); Complaint of Honorable Henry Maier, Mayor of Milwaukee, 93 FCC 2d 132 (1983) (mayor complained of series of editorials which questioned whether city was properly managing its activities.).

B. The Rationale

We submit that these cases 9/ are consistent with the broad mandate that the Commission has to conduct proceedings it deems necessary on the "petition of any interested party." 10/ In the instant case, it is, of course, obvious that the CIA is a party vitally interested in the Commission's determination of

9/ There are additional cases, For example, outside of the fairness doctrine or news distortion context, the Commission has heard complaints by agencies of the federal government. Complaint by U.S. Department of Defense Concerning Caribbean Communications Corporation, 55 FCC 2d 414 (1975) (Defense Department sought to prohibit cable television system from carrying the signal of the Armed Forces Television Station); In the Matter of The United States Department of Defense, Complainant v. The Hawaiian Telephone Company, Defendant, 81 FCC 2d 451 (1980) (Department of Defense challenged rate charges by common carrier).

10/ See, 47 CFR §1.1.

whether ABC violated its duty to the public through its false and distorted attacks on the CIA in its broadcasts of 19 and 20 September 1984. What is more critical, however, is that the fairness doctrine and the news distortion rule are long-established and vital components of the Commission's mandate to regulate the airwaves in the public interest. In overseeing and applying these doctrines, the Commission routinely relies, as it must, on others to bring pertinent facts to its attention. There is no reason in law or policy why a government agency should be prohibited from notifying the Commission of facts in its possession which may indicate a violation of the rules of the Commission regarding fairness or news distortion.

In addition to being completely consonant with the rules, policies and practice of the Commission, a full and fair consideration of the CIA's complaint is not in any way inconsistent with the First Amendment. Quite to the contrary, the type of review which the CIA has asked the FCC to undertake in this matter is one designed to promote First Amendment values. This is so for three reasons. First, the central concern of the First Amendment is with free, wide-open, robust debate of important public issues. New York Times v. Sullivan, 376 U.S. 254, 270 (1964). Second, the fairness doctrine and the rule against news distortion were developed to further this profound national commitment to free debate by requiring licensees to offer a balanced presentation of views on important issues, and not to slant or distort the news.

Fairness Report, supra, 39 Fed. Reg. 26372 ¶¶ 11 and 58. 11/

And lastly, our complaint serves only to notify the Commission that, in our opinion, ABC has violated these rules and its position of public trust and impaired the First Amendment rights of the American public.

11/ It is true that the fairness doctrine circumscribes to some extent the absolute right of licensees to broadcast whatever they want. But this is so because the First Amendment right of broadcast licensees to completely unfettered operation must bow to the superior First Amendment right of the public to be fully informed:

It is the right of the viewers and listeners, not the right of the broadcasters which is paramount It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee It is the right of the public to receive social, political, esthetic, moral and other ideas and experiences which is crucial here.

Red Lion, supra, 395 U.S. 367, 390 (1969).

Thus, the thrust of the CIA's complaint against ABC is not to silence legitimate criticism of the government, to curb bold investigative reporting, or to suppress free speech in any fashion. Rather, the complaint serves to notify the FCC, as the agency charged with regulation of the airwaves in the public interest, that ABC has violated its obligations under the First Amendment by injecting biased, false and distorted information into the marketplace of ideas. 12/

12/ In this respect, the CIA's complaint differs markedly from a suit for defamation which seeks to vindicate only a plaintiff's private interest in his reputation. By contrast, a fairness doctrine or news distortion complaint promotes a "paramount" First Amendment concern -- the public's right to be fairly, honestly, and adequately informed. Red Lion, supra, 395 U.S. at 390.

Indeed, the Commission and the courts have consistently recognized the distinction between the defamation remedy and FCC complaint procedures. Straus Communications, Inc. v. FCC, 430 F.2d 1001, 1007-08 (1976) (purpose of Personal Attack Rule is to foster public debate of public issues, not to vindicate reputation); In re Liability of WRIB, 53 FCC 2d 1251 (1975) ("The Commission's personal attack rule is entirely separate and distinct from any remedy which may exist under local laws relating to defamation"). Even ABC itself has represented to the Commission that "[T]he personal attack rule requires the broadcast media to provide a blanket protective device that goes beyond the existing libel and slander laws applicable to all media." Comments of American Broadcasting Companies, Inc. In the Matter of Repeal or Modification of the Personal Attack or Political Editorializing Rules, Gen. Docket No. 83-484, Sept. 6, 1983.

III. The ACLU and Media Access Project
Are Not Parties To And Have No Standing In
The Instant Complaint

As we detailed in Section I, supra, both the American Civil Liberties Union and the Media Access Project have embarked on a course of action in the instant complaint which we believe is without procedural precedent. We submit that both organizations, which ostensibly represent the public interest, have no standing to intervene in the complaint, as a party or otherwise, or to serve as the advocate for or against either the complainant or defendant.

While the Commission and staff are amply aware of the applicable procedures, we nevertheless note that the filing of fairness and related complaints are governed by 47 CFR §§1.1 - 1.120 (Part 1 -- Practice and Procedure; Subpart A -- General Rules of Practice and Procedure) and the Procedure Manual, 39 Fed. Reg. 32288. None of this authority permits or even suggests that a person or group might intervene or otherwise participate in a fairness or news distortion complaint. This, of course, stands in stark contrast to the explicit provisions set forth in the Procedural Manual with respect to application, hearing, or rule making proceedings which recognize and provide mechanisms for public input and/or intervention as a party. 13/

13/ See ¶21, ¶¶39-40, and ¶52, respectively, of the Procedure Manual, supra.

The instant matter is a complaint brought by the CIA against a broadcaster for deliberate news distortion and violations of the Fairness Doctrine. The ACLU has conceded that it is "not privy to the facts surrounding the controversy between the CIA and ABC, and, therefore, expresses no opinion on whether ABC deliberately engaged in news distortions." 14/ MAP does not even comment upon its factual knowledge and gives but passing reference to the intent and purposes of the Fairness Doctrine. 15/

Both ACLU and MAP present only legal argument and rely substantially on their fear that this Commission will abdicate its responsibilities, suppress First Amendment rights, and ignore the public interest. The ACLU believes this is so because of an undocumented fear that this complaint will "substantially chill[] investigative journalism" and "draw the Commission ... into oversight of the day-to-day operations of broadcasters." 16/ MAP believes this is so

14/ See ACLU Petition for Declaratory Relief, supra, 22 January 1985, at 3.

15/ See Statement of MAP In Opposition to CIA Amended Complaint, supra, 19 February 1985, at 8.

16/ See ACLU Petition for Declaration Relief, supra, 22 January 1985, at 4, 10.

because the CIA "is not an ordinary litigant" and has "financial and legal resources not available to private parties." 17/

We respectfully submit that neither these reasons nor established law should persuade the Commission to permit intervention by the ACLU and the MAP in the instant complaint. 18/

17/ See Statement of MAP In Opposition to CIA Amended Complaint, supra, 19 February 1985, at 2.

18/ With further respect to this issue, we note what may have been an inadvertent use of the term "parties". In a letter of 22 February 1985 from Chief, Mass Media Bureau to the CIA, Mr. McKinney observed that "[i]t is not clear whether CIA has served a copy of [prior] correspondence on ABC and the other parties to this complaint" (emphasis added). We reiterate our position that only ABC, CIA and the Commission are parties to our complaint.

IV. The Request Of CIA For An Oral Hearing

By letter dated 22 February 1985, Mr. James C. McKinney, Chief of the Mass Media Bureau denied the CIA's request for an oral hearing and observed that "all communications concerning this matter should be reduced to writing and made on the record." To clarify the record and eliminate any ambiguities, the CIA has never requested an ex parte hearing. Specifically, we refer to the letter from the CIA General Counsel to the Chief of the Mass Media Bureau dated 29 November 1984, a copy of which is provided herewith as Attachment 1:

We are available to meet with you at your earliest convenience to more fully outline the factual basis for our complaint. We understand that ABC will also be offered the opportunity to attend this meeting, which we would welcome. (emphasis added).

Accordingly, we renew our request that we be afforded an opportunity to present our case before the Commission with the full participation of ABC. In this regard we note that authority given the Commission under 47 CFR §1.1 to take oral testimony and hold such proceedings as are necessary in any matter which it has power to investigate under the law. We respectfully submit that an oral hearing in the instant complaint might efficiently and successfully resolve the disputed issues of fact at the heart of this complaint. Often, as here, the factual issues to be decided are a mixture of true facts and intent and, typically, proof may turn on inferences drawn from other facts -- facts in the exclusive possession of the challenged party. In such circumstances, the controlling law is clear:

... it is fundamentally unfair for the FCC to dismiss a challenge where the challenging party has seriously questioned [the conduct of a licensee] and the defending party is the party with access to the relevant information.

California Public Broadcasting Forum v. FCC, ___ F.2d ___, Nos. 82-1235 and 83-2105, lexis opinion at 10 (D.C. Cir. 11 January 1985) (Citing Citizens Committee To Save WEFM v. FCC, 506 F.2d 246, 265-66 (D.C. Cir. 1974)).

In the matter at hand, the CIA has "raised a vigorous factual dispute" regarding the violation of Commission rules and policies by ABC. Id., at 11. In such instances, a hearing is fully warranted and legally justified. As the District of Columbia Circuit recently observed in California Public Broadcasting Forum:

FCC's decision denying a hearing on this issue was not reasoned and was arbitrary and capricious. The Commission here ignored statutorily adequate allegations going to a substantial and material factual dispute and in effect obviated the need for a hearing by finding itself that one factual version was the true and correct one. Yet the determination of which factual version is indeed accurate is precisely the function of an evidentiary hearing. In this case such a hearing should have been ordered. On this ground, therefore, we reverse the FCC's denial of a hearing and remand for the hearing that is required by statute.

Id.

We respectfully submit that our request for an oral meeting be granted.

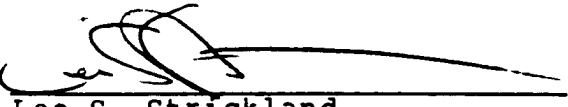
V. Conclusion

For the foregoing reasons, the complainant Central Intelligence Agency requests that the Commission take all appropriate action necessitated by the facts and argument presented herein and in the CIA's pending Amended Complaint And Petition For Reconsideration.

Respectfully submitted,

UNITED STATES
CENTRAL INTELLIGENCE AGENCY

By:


Lee S. Strickland
Counsel for Complainant
Central Intelligence Agency

Dated: 4 March 1985

BEFORE THE
UNITED STATES
FEDERAL COMMUNICATIONS COMMISSION

In re Complaint of)	
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vs.)	FCC Docket No. _____
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SUPPLEMENTAL FILING OF CIA
AND
OPPOSITION OF CIA TO AMERICAN CIVIL LIBERTIES UNION
PETITION FOR DECLARATORY RULING

ATTACHMENT 1

CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

General Counsel

29 November 1984

Mr. James C. McKinney
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. McKinney:

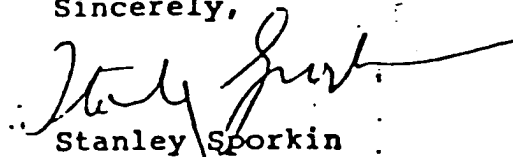
Re: In re Complaint of the Central Intelligence
Agency v. American Broadcasting Company

To assist you with your consideration of our complaint, I am forwarding herewith a videotape that contains the unedited investigative reports prepared by Gary Sheppard and aired on "ABC World News Tonight" on 19 and 20 September 1984. The videotape also contains a statement aired on 26 September 1984 in which ABC "stood by its story" and the "clarification" by ABC broadcast on 21 November 1984. This clarification addressed only one area of the 19 and 20 September reporting -- the statements of Scott Barnes -- which ABC now admits cannot be substantiated.

In addition, I have also included a copy of a Mailgram sent to the Director of Central Intelligence William Casey by Scott Barnes. While the CIA cannot vouch for the authenticity of the mailgram, the CIA has no reason to believe that it did not come from Scott Barnes. The Mailgram, which was also sent to the President of ABC News, is important as it is a denial by Scott Barnes of "previous stories" about his involvement with the CIA in any "assination [sic] plots and allegations of this nature."

~~We are available to meet with you at your earliest
convenience to more fully outline the factual basis for our
complaint. We understand that ABC will also be offered the
opportunity to attend this meeting, which we would welcome.~~

Sincerely,


Stanley Sporkin

Enclosures

Certificate of Service

I, Lee S. Strickland, an attorney admitted to practice before the bars of the District of Columbia and the Commonwealth of Virginia, do hereby certify, pursuant to 47 CFR §§1.47 and 1.51(c)(2), that the original and 4 copies of the foregoing "Supplemental Filing of CIA And Opposition Of CIA To American Civil Liberties Union Petition For Declaratory Ruling" have been filed with the Federal Communications Commission and that one copy each has been served on the following counsel for party defendant ABC:

Mark D. Roth, Esq.
American Broadcasting Companies, Inc.
1330 Avenue of the Americas
7th Floor
New York, New York 10019

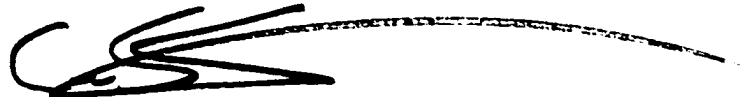
Robert W. Coll, Esq.
McKenna, Wilkinson, Kittner
American Broadcasting Companies, Inc.
1150 7th Street, N.W.
Washington, D.C. 20036

and that informational copies have been provided to:

Michael P. McDonald, Esq.
General Counsel
American Legal Foundation
1705 N Street, N.W., Suite 300
Washington, D.C. 20036

Andrew Jay Schwartzman, Esq.
Media Access Project
1609 Connecticut Avenue, N.W.
Washington, D.C. 20009

The American Civil Liberties Union
c/o Robert T. Perry, Esq.
Media Law Clinic
New York Law School
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New York, New York 10013



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Central Intelligence Agency
Washington, D.C. 20505
(703) 351-6928

Dated: 4 March 1985